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No. 89-1668

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# In the Supreme Court of the United States

OCTOBER TERM, 1990

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UNITED STATES OF AMERICA, ET AL., PETITIONERS

*v.*

MARCUS S. SMITH, ET AL.

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## REPLY BRIEF FOR THE PETITIONERS

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# In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1646

UNITED STATES OF AMERICA, ET AL., PETITIONERS

*v.*

MARCUS S. SMITH, ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## REPLY BRIEF FOR THE PETITIONERS

1. Respondents do not defend the rationale on which the court of appeals relied in holding the Reform Act inapplicable to this case. Noting that respondents "have no remedy against the United States" by virtue of the foreign tort exception to the Federal Tort Claims Act, the Ninth Circuit ruled that "[b]ecause they do not, [the Reform Act] does not operate to provide Dr. Marshall with immunity." Pet. App. 11a. Evidently recognizing that this reasoning is untenable, respondents suggest that the court "did *not* decline to apply [the Reform Act] simply because the foreign country exception pre-

cludes a remedy against the United States." Resp. Br. 45.[1] They argue for affirmance of the court's judgment exclusively on the ground that the Gonzalez Act forecloses application of the Reform Act to this case.

As we demonstrated in our opening brief (U.S. Br. 11-30), the Ninth Circuit's interpretation of the Reform Act contradicts the statute's language, legislative history, and stated purpose. It was clearly Congress's intention to prohibit—with the exception of actions for violation of the Constitution or a federal statute—all suits against federal employees based on

[1] In respondents' view, the court of appeals "held that [the Reform Act] does not 'take away' [respondents'] cause of action against Dr. Marshall or otherwise bar medical malpractice claims cognizable under the Gonzalez Act." Resp. Br. 5; see, *e.g.*, *id.* at 6 (court's ruling was "based on * * * the Gonzalez Act"); *id.* at 8 (court held that the Reform Act did not "supercede or take away [respondents'] Gonzalez Act remedy"); *id.* at 27 (same); *id.* at 33 (same); *id.* at 45.

The court of appeals' opinion does not sustain respondents' reading; in rejecting the government's reliance on the Reform Act, the court of appeals construed that statute on its own terms, without regard to the Gonzalez Act. Pet. App. 11a-12a. The opinion nowhere discusses the issue that respondents suggest was the subject of the court's holding—*i.e.*, the question whether the Reform Act "take[s] away" respondents' "Gonzalez Act remedy" (Resp. Br. 8, 27, 33). The phrase "Gonzalez Act remedy" does not appear in the opinion. The sentence on which respondents rely reads, referring to the legislative history of the Reform Act, "These legislative statements support our conclusion that [the Reform Act] did not take away [respondents'] cause of action against Dr. Marshall." Pet. App. 12a. The "cause of action" referred to is respondents' malpractice claim based on state or Italian law.

Plainly, the court's reasoning with respect to the Reform Act would be equally applicable to a claim that a federal employee's negligence caused an automobile accident overseas.



torts committed within the scope of their employment, including those suits in which an FTCA exception would bar an action against the United States. Consequently, this Court should hold that the Reform Act is fully applicable to claims that fall within exceptions to the FTCA.

2. Respondents argue that the Gonzalez Act requires a different result when a military physician is sued for malpractice committed abroad. Although the court of appeals did not address that issue (see note 1, *supra*), we agree that it is ripe for decision if the Court is inclined to reach it.[2] We stress at the outset, however, the precise extent of our disagreement with respondents' position. In the court of appeals, the government withdrew its contention that the Gonzalez Act itself required substitution of the United States as the defendant in the action. See U.S. Br. 5 & nn.2-3. Nevertheless, the court of appeals addressed that issue and decided it in respondents' favor. Pet. App. 2a-9a. The petition for certiorari did not seek further review of that aspect of the court of appeals' decision, and we do not argue here that the Gonzalez Act requires the substitution of the United States as the defendant in this action.[3]

[2] See *Blum* v. *Bacon*, 457 U.S. 132, 137 n.5 (1982); R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 382 (6th ed. 1986).

[3] We note, however, that the question whether the Gonzalez Act barred an action against Dr. Marshall was not beyond debate. One court of appeals held that the Act did foreclose actions against military physicians in cases of this type, *Powers* v. *Schultz*, 821 F.2d 295 (5th Cir. 1987), and the House committee report accompanying the Reform Act cited *Powers* for the proposition that the Reform Act would preclude actions against federal employees when an FTCA exception barred an action against the United States. See U.S. Br. 36 n.21.

Where we part company with respondents is over the question whether the Gonzalez Act justifies a refusal to substitute the United States as the defendant *under the Reform Act*. There is no dispute—and the Attorney General's designate has certified—that respondents' claims are based upon "personal injury" arising from the allegedly "negligent or wrongful act or omission of [an] employee of the Government while acting within the scope of his office or employment" (28 U.S.C. 2679(b)(1)). Thus, under the Reform Act, an FTCA action against the United States is the exclusive remedy for those claims (*ibid.*); the United States must be substituted as the defendant (28 U.S.C. 2679(d)(1)); and the action is subject to the foreign tort exception (28 U.S.C. 2679(d)(4)).

The Gonzalez Act does not mandate a different result. First, the Gonzalez Act does not give rise to a claim of the type that either of the express exceptions to the Reform Act allows to be brought against a federal employee. Second, the Gonzalez Act lends no support to an implied exception to the Reform Act —under the presumption against implied repeals or any other principle of statutory construction.

a. In arguing that their claim falls within an express exception to the Reform Act (Resp. Br. 29-33), respondents fail totally to come to terms with the language of those exceptions. Respondents appear to read the Reform Act as saying that it is not to be "construed in derogation of other federal statutes which authorize actions against individual federal employees" (*id.* at 29). But the Act says no such thing. It makes clear that the exceptions apply *only* to actions "brought for a violation" of the Constitution or a federal statute. 28 U.S.C. 2679(b)(2)(A)-(B). Respondents cannot—and do not—contend that



their action has been brought for "*a violation of*" the Gonzalez Act or any other federal statute.[4]

The legislative history of the Reform Act is fully consistent with the precisely drafted language of those exceptions. Compare Resp. Br. 29-32. The House committee report, relied upon by respondents at several points (*id.* at 28, 30, 33, 36-37 & n.19), states that the exception for federal statutory claims was designed to preserve

> express or implied statutory rights of action for injunctive relief or damages under the usual rules of construction applied by [this] Court in such cases as: *Cort* v. *Ash*, 422 U.S. 66 (1975); *Piper* v. *Chris-Craft Industries*, 430 U.S. 1 (1977); and *Transamerica Mortgage Advisors Inc.* v. *Lewis*, 444 U.S. 11 (1979).

H.R. Rep. No. 700, 100th Cong., 2d Sess. 7 (1988).

The language of the Reform Act accurately describes the "express or implied statutory rights of

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[4] Discussions of the Reform Act in two cases cited by respondents (Resp. Br. 29-30)—*Washington* v. *United States Postal Service*, No. 87 C 5782 (N.D. Ill. Mar. 6, 1990), and *Saratoga Savings & Loan Ass'n* v. *Federal Home Loan Bank*, 724 F. Supp. 683 (N.D. Cal. 1989)—do not suggest otherwise. In *Washington*, the plaintiff sought relief under 42 U.S.C. 1985(2), alleging that the defendants had retaliated against her for pursuing civil rights claims. That action can fairly be characterized as one based upon a violation of a federal statute that prohibits conspiracies to engage in retaliation of that type. In *Saratoga*, the court dismissed claims based upon violations of the Due Process Clause, First Amendment, the federal conflict of interest statute, and the National Housing Act. 724 F. Supp. at 689-690. In a brief aside, the court noted that the Reform Act would not have required substitution of the United States as the defendant with respect to these claims. *Id.* at 689 n.6. Nothing in these cases remotely suggests that the Reform Act exempts any actions against federal employees that are not based on a violation of federal law.

action" referred to in the cited cases. Those cases involved claims that defendants had violated federal statutes, and the issue was whether those statutes could be interpreted to authorize remedies in favor of private parties for the violations. Respondents' reliance on the Gonzalez Act cannot be brought within this framework, as their own strained attempt to invoke *Cort* v. *Ash*, 422 U.S. 66 (1975), demonstrates. See Resp. Br. 32 & n.16. It is impossible to find in the Gonzalez Act—a statute that creates no duties running from military physicians to their patients and provides no remedy to patients—an intention to provide a federal right of action in favor of respondents.

Nor do the only two references to the Gonzalez Act in the House committee report furnish any support for respondent's position. First, the report indicates that the Gonzalez Act was one of several statutes viewed as "substantial precedent" for the Reform Act. H.R. Rep. No. 700, *supra*, at 4. Second, the report cites *Powers* v. *Schultz*, 821 F.2d 295 (5th Cir. 1987), as one of several examples of how the Reform Act would bar claims falling within exceptions to the Federal Tort Claims Act. See note 3, *supra*. Even if there were an ambiguity in the language of the statute (and there is not), these references would not support recognition of an exception to the Reform Act for individuals encompassed by the Gonzalez Act. Rather, they suggest an intention to draw on the precedent of earlier immunity statutes in fashioning a broad provision conferring an equal measure of protection on all federal employees from all tort claims not based upon a violation of federal law. The purpose of the Reform Act is to "substitute the



United States as the solely permissible defendant in *all common law tort actions against Federal employees*," H.R. Rep. No. 700, *supra*, at 6 (emphasis added); see *id.* at 2, 4, 8-9, not to add another element to what respondents aptly describe as the preexisting "patchwork system of immunity" (Resp. Br. 32).

In short, respondents seriously misstate our argument as asserting that the Reform Act "by not expressly permitting [them] to pursue their Gonzalez Act remedy, now impliedly precludes them from doing so." Resp. Br. 33. Subject to the Reform Act's two stated exceptions, the Act *expressly* makes an action under the Federal Tort Claims Act for torts committed by "any employee of the Government" acting within the scope of employment exclusive of "any other civil action or proceeding for money damages." 28 U.S.C. 2679(b)(1)-(2). This language is not "ambiguous," nor would "a literal interpretation * * * thwart an overall statutory scheme or lead to absurd results" (Resp. Br. 33). As we demonstrated in our opening brief, our interpretation of the Reform Act is consistent with the findings and statement of purpose enacted as part of the statute, as well as with its legislative history. U.S. Br. 24-30.

b. Because respondents cannot bring their action within one of the express exceptions to the Reform Act, they bear the very heavy burden of establishing an additional, implied exception for their claims. "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *Andrus* v. *Glover Constr. Co.*, 446 U.S. 608, 616-617 (1980). In seek-

ing to sustain that burden, respondents rely primarily on the canon of statutory construction that implied repeals of statutes are not favored. See Resp. Br. 33-44. But the presumption against implied repeals is inapplicable here, and, even if it were applicable, it would not justify denying effect to the unambiguous language of the Reform Act.

i. Respondents' implied-repeal argument is built upon a fundamental mischaracterization of the Gonzalez Act. Throughout their brief, respondents assert that the Gonzalez Act gives rise to a federal cause of action against Dr. Marshall. We are told, for instance, that respondents are pursuing a "Gonzalez Act remedy" (Resp. Br. 8, 33, 46); that "the instant suit is based on a federal statute" (*id.* at 38 n.20); that the Gonzalez Act "governs the liability *vel non* of military physicians for torts committed within the scope of their military medical duties overseas" (*id.* at 2, 6); that respondents' claims are "cognizable under the Gonzalez Act" (*id.* at 5); that claims against military physicians based upon alleged malpractice abroad are "causes of action arising expressly *and* by implication from the Gonzalez Act" (*id.* at 32; see *id.* at 30 & n.15); and that military medical personnel are "susceptible to suit under the Gonzalez Act" for malpractice abroad (*id.* at 9, 13). Not content with arguing that position, respondents even assert that the government has "conced[ed] that the Gonzalez Act authorizes suit against Dr. Marshall" and that the court of appeals adopted their view of the Gonzalez Act. *Id.* at 3-4, 5, 10; see, *e.g.*, *id.* at 6, 9, 10, 13 (attributing respondents' position to the court of appeals).

These assertions are all wide of the mark, and they gain no substance through repetition. As demonstrated in our opening brief (U.S. Br. 32-33), the Gonzalez Act does not furnish respondents with any right of action against Dr. Marshall. The Act does not impose any duty on military physicians or confer any remedy on injured parties. The most that can be said is that in some cases the Gonzalez Act does not bar suit against a military physician and that the Act authorizes officials to indemnify military medical personnel against unfavorable judgments.[5] Any claim that respondents may have against Dr. Marshall is based exclusively on some other source of law.[6]



[5] The legislative history of the Gonzalez Act does not suggest that its purpose was to enhance the remedies available to injured plaintiffs. The purpose of the bill as a whole was described as being "to provide, through application of the Federal Tort Claims Act, protection from individual liability to certain medical personnel while acting within the scope of their official duties." S. Rep. No. 1264, 94th Cong., 2d Sess. 1 (1976). Moreover, the Senate report did not suggest that the authority to indemnify military physicians was motivated by a desire to provide a remedy to injured parties. The purpose of Section 1089(f), it stated, was "to avoid liability being assessed against an individual medical personnel in a situation where the Federal Tort Claims Act would not be applicable." S. Rep. No. 1264, *supra*, at 10.

[6] Respondents also overstate the extent to which the Gonzalez Act itself confers protection on military physicians sued for malpractice abroad. The Act does not "entitle" Dr. Marshall to indemnity, and the court of appeals did not so hold. Compare Resp. Br. 4, 5, 10, 13, 20-21. Rather, 10 U.S.C. 1089(f) provides that the relevant agency head "may, to the extent that the head of the agency * * * considers appropriate, hold harmless or provide liability insurance" for such physicians. As the regulation cited by respondent reflects (Resp. Br. 13), the Department of Defense has adopted a policy of indemnifying its physicians. That regulation represents an exercise of the authority conferred by the Gonzalez Act, not an interpretation of any statutory requirement. Compare, *e.g.*, *id.* at 12-13.

The Gonzalez Act's precise effect on the parties' rights and duties is not, as respondents suggest, a "semantic question with no bearing on the issue of implied repeal" (Resp. Br. 42). A proper understanding of the Gonzalez Act's legal effect determines whether there has been any "repeal," in whole or in part, that could trigger the presumption against implied repeal in the first place. To illustrate the point, it is helpful to consider the case that would arise if a State (or foreign country) passed a statute capping medical malpractice awards—or, for that matter, abolishing them altogether. Such a statute could have no effect on federal law; it could not repeal any "Gonzalez Act remedy" (*id.* at 8, 33, 46), if there were one against an individual. It is clear, however, that the Gonzalez Act would not render such a statute unenforceable as applied to military medical personnel. The reason is obvious. The Gonzalez Act confers no right on a plaintiff to recover for medical malpractice. Thus, there is no inconsistency between that Act and a statute that limits or abolishes malpractice claims, and no reason to consider whether, and to what extent, such a statute could lawfully "repeal" the Gonzalez Act.

The same analysis controls this case. There is no more inconsistency between the Gonzalez Act and the Reform Act than there would be between the Gonzalez Act and a non-federal statute that effectively abolished respondents' claims. To be sure, the Reform Act reduces (but does not eliminate) the occasions on which the Defense Department may be called upon to indemnify a physician who has been held liable under some other law. But that kind of effect does not trigger the presumption against implied repeals.



In this respect, this case is quite similar to *United States* v. *Fausto*, 484 U.S. 439 (1988). In *Fausto*, the question was whether the Civil Service Reform Act of 1978 precludes a federal employee from suing in the Claims Court under the Back Pay Act to obtain judicial review of an allegedly unlawful termination. The Court held that the CSRA forecloses such judicial review, even though review could have been obtained in the Court of Claims (the predecessor of the Claims Court) prior to the passage of that Act. The Court rejected a contention that this result would violate the presumption against implied repeals, explaining that the presumption does not apply to the "repeal by implication of a legal disposition implied by a statutory text" and that the Back Pay Act would "remain[] an operative part of the integrated statutory scheme set up by Congress to protect civil servants." 484 U.S. at 453.[7]

Similar reasoning governs this case. Provisions of the Gonzalez Act, courts have found, contemplate that certain actions against military physicians based upon non-federal law are not barred. But this is at most "a legal disposition implied by a statutory text" (484 U.S. at 453). The Reform Act, by providing federal employees with an independent source of im-

[7] The Court explained that the Court of Claims had reviewed discharges by virtue of its having been deemed an "appropriate authority under applicable law" to consider employees' claims of unlawful termination. But after the enactment of the CSRA's "comprehensive and integrated review scheme," the Court of Claims was no longer such an authority. The only appropriate authorities to consider employees' claims were those, if any, designated by the CSRA. Thus, the effect of the CSRA was to withdraw from the Court of Claims the power to consider certain issues. That consequence was held not to trigger the presumption against implied repeals. 484 U.S. at 454.

munity, does not abrogate the Gonzalez Act. It merely reduces the availability of actions against military physicians under non-federal law. The presumption against implied repeals is no more applicable in this case than it was in *Fausto*.

Moreover, the Gonzalez Act remains "an operative part of the integrated statutory scheme" (484 U.S. at 453) by which federal employees are protected from suit. The fact that Congress chose not to repeal the Gonzalez Act and other similar statutes provides no support for respondents' implied-repeal argument. See Resp. Br. 27-28. The Gonzalez Act will continue in two respects to play a role in protecting military medical personnel who are also encompassed by the Reform Act. First, the Gonzalez Act will authorize indemnity in those cases, such as suits initiated in foreign courts, in which the Reform Act might not be enforceable. See *Powers* v. *Schultz*, 821 F.2d at 297. Second, the provision of the Gonzalez Act waiving sovereign immunity as to medical malpractice claims sounding in intentional tort, 10 U.S.C. 1089(e), will enable plaintiffs to pursue those claims against the United States. The fact that Congress did not expressly repeal the Gonzalez Act does not provide any basis for an inference that Congress meant to exempt military medical personnel from the Reform Act.

For similar reasons, there is no inconsistency between our position and the enactment, in the same year as the Reform Act, of a waiver of sovereign immunity for malpractice claims sounding in intentional tort against medical personnel of the Veterans Administration, 38 U.S.C. 4116(f). See Resp. Br. 40-41. Had that amendment not been passed, the effect of applying the Reform Act to VA physicians would have been to bar such "intentional" malpractice claims altogether. By virtue of its enactment, plaintiffs may now pursue those claims against the United States. (Significantly, the Federal Drivers Act, the statute that Congress did expressly supersede, did not contain any comparable provision that could be given effect consistent with the Reform Act.)



As respondents suggest (Resp. Br. 38), Congress was aware of the existence of the Gonzalez Act and other similar statutes when it drafted the Reform Act. Nevertheless, none of the actions Congress took (and failed to take) is inconsistent with enforcement of the plain meaning of the Reform Act. Indeed, in view of the continued need for the provisions of the Gonzalez Act even after the enactment of the Reform Act, leaving that statute on the books was an entirely sensible drafting decision.

Respondents' position is far less plausible. It contemplates that Congress, acting with the Gonzalez Act and other narrow immunity statutes plainly in mind, intended to exempt federal employees covered by those statutes from the Reform Act, but failed to include an express exception to implement that intention. The fact that Congress did provide express exceptions for other claims heightens the incongruity of that notion.

ii. Even if the circumstances of this case triggered the presumption against implied repeals, the Reform Act would satisfy the requirements of that canon. There is no rule that "all-encompassing statutory language is not to be literally construed" (Resp. Br. 29), nor is the Reform Act a statute that "cannot mean what it says," *National Soc'y of Professional Engineers* v. *United States*, 435 U.S. 679, 687 (1978).[8] Applied in accordance with its terms, the

[8] In *National Soc'y of Professional Engineers*, the Court noted that literal application of the Sherman Act's prohibition

Reform Act operates coherently, both alone and in conjunction with the Gonzalez Act. The Reform Act's text contains abundant evidence that Congress intended the Act to be all-encompassing. The statute employs a defined term that includes all members of the military in extending the Reform Act's protection to "any employee of the Government," 28 U.S.C. 2679(b)(1). See 28 U.S.C. 2671. In 28 U.S.C. 2679(b)(1), the FTCA remedy is made exclusive of "any other civil action or proceeding for money damages" by reason of a tort committed by a federal employee acting within the scope of his employment; the Attorney General is authorized to issue a scope certification in "any civil action or proceeding" commenced in state or federal court on such a claim, 28 U.S.C. 2679(d)(1)-(2); upon the issuance of a scope certification, "any action or proceeding" in which it was issued must proceed in the same manner as any action against the United States subject to the limitations and exceptions applicable to those actions, 28 U.S.C. 2679(d)(4); and the Act applies "to all claims, civil actions, and proceedings pending on, or filed on or after," its date of enactment, Section 8(b), 102 Stat. 4565-4566, Pet. App. 25a. Congress's intention to legislate as comprehensively as this language suggests is confirmed by the staute's findings and statement of purpose, its legislative history addressed to the precise point at issue, and its two narrowly tailored exceptions.

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of "every" contract that restrains trade would "outlaw the entire body of private contract law." 435 U.S. at 687-688. *Briscoe* v. *LaHue*, 460 U.S. 325, 330 (1983), and *Tenney* v. *Brandhove*, 341 U.S. 367 (1951), determined that 42 U.S.C. 1983's reference to "[e]very person" who acts under color of state law could not be interpreted to abrogate well-established common law immunities.



Cases cited by respondents in which this Court declined to find implied repeals did not involve statutory provisions similar to those at issue here. For instance, in *Morton* v. *Mancari*, 417 U.S. 535 (1974), employees of the Bureau of Indian Affairs argued that Congress, in enacting Title VII's prohibition on invidious discrimination, had impliedly repealed a statute obligating the BIA to grant employment preferences to Indians. This Court rejected that claim, noting that Title VII contained an express exception for other Indian preferences and that Congress had manifested a longstanding commitment to Indian preferences (a commitment reaffirmed in statutes passed after Title VII). *Id.* at 547-551.[9] The Reform Act does not include any exception supporting respondents' position and literal application of that Act would not contradict any established congressional program.

In *Wood* v. *United States*, 41 U.S. (16 Pet.) 342 (1842), the Court rejected a claim that a statute providing for a forfeiture of imported goods if an inspection revealed that they had been undervalued for

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[9] In *Morton*, it appeared that the Bureau of Indian Affairs would have violated Title VII, standing alone, if it afforded Indians the employment preference that a previously enacted statute *required*. Thus, there was no means of reconciling the two statutes without considering whether Title VII had impliedly repealed the Indian preference.

Similarly, in *United States* v. *United Continental Tuna Corp.*, 425 U.S. 164 (1976), the Court refused to find an implied repeal of a statutory *bar* to suit against the United States in certain circumstances on the basis of a later authorizing statute. As in *Morton*, the two statutes could not be reconciled without resolving the issue of implied repeal. And a careful examination of the history and purpose of the later statute disclosed a legislative objective far narrower than would be needed to support a holding of implied repeal.

tariff purposes impliedly repealed a statute providing for a forfeiture of goods imported under false invoices. In *Wood*, the second statute only specified one situation in which a forfeiture would occur. It did not purport to exclude other bases for a forfeiture; indeed, as this Court noted, there was not "the slightest repugnancy between" the two statutes. *Id.* at 364. Here, by contrast, the Reform Act expressly applies to "any employee of the Government," and respondents' conception of the Gonzalez Act would require a result directly at odds with several provisions of the Reform Act. Even if respondents were correct in suggesting that the Gonzalez Act "authorizes" the pursuit of an action against military medical personnel, the presumption against implied repeal—as it has been applied in this Court's cases—would not justify denying effect to the Reform Act.

Congress's decision to confer immunity on individual employees in cases in which an action against the United States is barred may operate to leave an injured person without the right to sue in tort (although, in cases like this, an administrative remedy is potentially available).[10] But when it enacted the Reform Act, Congress made a deliberate choice with full awareness of the consequences. The House committee report on the Act explained (H.R. Rep. No. 700, *supra*, at 6):

> The "exclusive remedy" provision of section 5 is intended to substitute the United States as the solely permissible defendant in all common law tort actions against Federal employees who acted in the scope of employment. Therefore, suits against Federal employees are precluded even where the United States has a defense which prevents an actual recovery. Thus, any claim against the government that is precluded by the exceptions set forth in Section 2680 of Title 28, U.S.C. also is precluded against an employee [or] his or her estate.
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> * * * * *

For the reasons stated above and in our opening brief, the judgment of the court of appeals should be reversed, and the case should be remanded with instructions to substitute the United States as the sole defendant and to dismiss the action.

Respectfully submitted.

KENNETH W. STARR
*Solicitor General*

OCTOBER 1990

[10] See Armed Forces (Military Claims) Act, 10 U.S.C. 2733 *et seq.* We are advised that respondents filed a claim under this statute, but that there is a substantial question as to whether they complied with the relevant two-year statute of limitations.



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